Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

ROBERT F. COLLINS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF TO GOVERNMENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONER

ARGUMENT

Petitioner Robert F. Collins files this reply brief pursuant to Rule 15.6 of the Supreme Court Rules to address arguments raised by the United States in its brief in opposition.

Before addressing the arguments individually, Petitioner brings to this Court's attention the fact that the government uses almost one-half of its brief to quote the court of appeals' version of the facts in this matter. As noted in the Statement of Facts in his petition, this version of the facts was unbalanced and failed to present a fair view of the evidence. Without understanding the facts as set forth in his Petition, this Court cannot understand the significance of the constitutional issues Petitioner has raised.

Likewise, the remainder of the government's brief almost parrots the court of appeals' opinion, glossing over or completely missing the important points raised by Petitioner.

For example, the government asserts that before it could compile and analyze the data in its telephone poll, defense counsel learned about it; then, the district court immediately ordered the polling stopped. (Opp. 8.) This assertion completely ignores the analysis by the government, shown in its circling of answers to certain questions in the poll, including the circling of the 63.3% of those answering who thought a defendant had to prove himself innocent and the 89.6% of those answering who thought Petitioner was guilty. (Pet. 13, n.3.) This government analysis was confirmed by the pollster himself during his

testimony at Petitioner's Motion for New Trial. (Pet. 13, n.3.)

Further, for the government to quote the district court's characterization of the poll and its results as "an unintelligible series of numbers and symbols," (Opp. 12.) in the face of the specific poll results (Appendix F) that show the prejudice against Petitioner *and* total disregard *or* ignorance of constitutional principles is a mockery.

The government also misses the point when it argues that there was no constitutional violation because the district court found no member of the jury venire had been polled or because the specific demographic information of the poll was not given to the government. (Opp. 17.) The point *is* that the prosecution was able, using its vast financial resources, to pre-try its case to individuals who would resemble the ultimate jurors, learning their biases and prejudices and lack of knowledge of the Constitution. The fact that the government was given exclusive use of this poll by the district court, which prohibited the defense from conducting its own poll, compounded the error. This is a denial of due process.

Indeed, by pre-trying its case, the government learned that based upon its version of the facts 89.6% of those polled thought Judge Collins was guilty before trial. A recent national poll states that 28% of jurors in general believe a defendant is guilty or probably guilty, an astounding figure in and of itself. "Many Jurors Consider Deep Pockets and Ignore Presumption of Innocence," The National L.J., Feb. 22, 1993, at S12. For the government on one hand to learn that almost 90% of potential jurors thought Judge Collins was guilty after

hearing the government's version of the facts but on the other hand to argue the poll was of no use or value is ridiculous and mocks the principles of due process and fair trial.

In regard to Petitioner's claim of error under *Batson v. Kentucky*, 476 U.S. 79 (1986), the government again blindly follows the court of appeals in arguing that Petitioner had an opportunity to raise his *Batson* arguments before the venire was dismissed but failed to do so. (Opp. 20.) Petitioner notes that it was the district court, not petitioner, which chose to dismiss the venire even though the trial judge knew Petitioner was raising *Batson* challenges. (Pet. 17, n.5.) The trial court erred further when he allowed the prosecution a two-day delay before presenting its reasons for striking jurors, with the result that the venire was long gone by then. Therefore, the government's reasons could not be tested through examination of the venire.

The government also makes the same baseless assertion in its opposition as it did at trial in regard to the peremptory challenge of one juror: he was challenged because of an ongoing investigation of his company. (Opp. 22.) The government conveniently neglects to mention that the potential juror was a newly hired, hourly worker who even had listed his occupation as "unemployed" on the jury questionnaire. (Pet. 21.) Even so, prosecutions at this company ended years ago, and a new worker on the lower rungs of the employment ladder hardly would know about or be influenced by such investigation, even if there were one.

In regard to Petitioner's claim of prosecutorial misconduct during the government's rebuttal argument, the government claims that the comment at issue, when taken into context, was directed at the Petitioner's defense, not his failure to testify. (Opp. 23.) This argument overlooks the prosecutor's specific explanation as to what he meant. Specifically, the prosecutor stated to the trial court in reply to Petitioner's Motion for Mistrial that he was commenting on the Petitioner's failure to tell anyone what the $16,000.00 was for on the "scene." (Pet. 25.) In context, the "scene" can only mean the Petitioner's chambers when and where the money was found. The district court's interpretation of the comment as referring to all the events on August 10, including Petitioner's automobile ride with FBI agents, is belied by the prosecutor's explanation.

Finally, Petitioner argues that the government's interpretation of the United States Sentencing Guidelines reads into the guidelines a meaning that has no basis. To rely on a pre-guideline offense of Gary Young, a separate defendant in a separate case, as the underlying offense for sentencing Judge Collins is a legal contradiction under the Guidelines.

The case of *United States v. Willis,* 925 F.2d 59 (10th Cir. 1991) is inapplicable because the conviction used to enhance the defendant's sentence in that case was the defendant's own conviction. Here, Gary Young's conviction in a separate, pre-guideline case is being used to enhance Judge Collins' sentence in a guideline case. This is a denial of due process. Petitioner again refers this Court to *United States v. O'Campo,* No. 91-1089 (1st Cir. 1991), 51 Crim. L. Rep. 1554 (BNA), for the analogous

proposition that relevant conduct for sentencing of a conspirator *does not* include liability for substantive acts committed by others in furtherance of the conspiracy prior to the conspirator's joining the conspiracy.

CONCLUSION

Because the brief of the United States misses the mark in understanding the constitutional issues Petitioner has raised, and because these constitutional issues are of such importance and include novel issues of due process and fair trial, Petitioner submits this Court should grant a Writ of Certiorari.

Respectfully submitted,

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